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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 153

**EDMUND L. EBERT, ANDREW J. KEARY, AND
ELLA R. KEARY, PETITIONERS,**

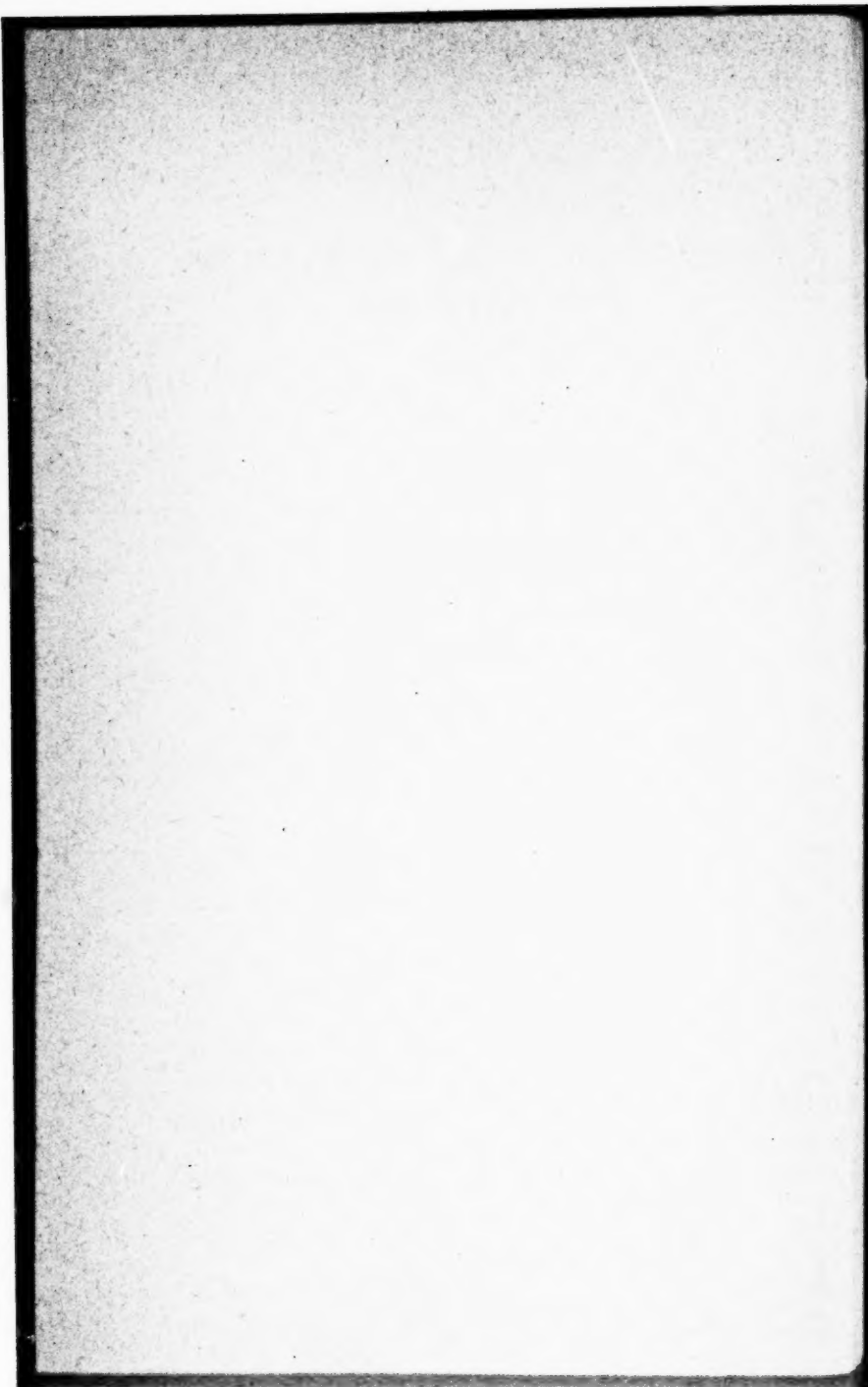
vs.

DR. HARRY P. POSTON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

P. J. M. HALLY,
Counsel for Petitioners.

(29,822)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 512.

EDMUND L. EBERT, ANDREW J. KEARY, AND
ELLA R. KEARY, PETITIONERS,

vs.

DR. HARRY P. POSTON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition for a writ of certiorari of Edmund L. Ebert, Andrew J. Keary, and Ella Keary respectfully shows unto this honorable court as follows:

1. That the respondent, Dr. Harry P. Poston, in May, 1917, purchased certain lots located in the township of Hamtramck, Wayne County, Michigan; at the time of his purchase, these lots, with certain others, were subject to a mortgage in the sum of \$4,000.00. A clause in the mortgage provided for a release from its provisions of any lot on the payment of \$200.00 and interest. To this extent, the re-

spondent assumed the mortgage and agreed to pay it (Record, 120; Exhibit 1).

2. That on February 5, 1918, under a power of sale contained in this mortgage, because of default in the payment of principal and interest, his lots were sold at public auction to Andrew J. Keary and Ella Keary, at the time and place fixed by the law of Michigan, a copy of which is hereto affixed as Exhibit 1 hereof (Record, 38). That on the same date after the sale in accordance with the provisions of (14957) section 9 of said Exhibit 1, the sheriff's deed of this property to Andrew J. Keary and Ella R. Keary, the purchasers, was made, recorded and placed in the custody of the Register of Deeds of Wayne County, Michigan (Record, 83, 112, 130; Exhibit A).

3. That on March 8, 1918, one month and three days after this sale, the Congress of the United States passed the "Soldiers' and Sailors' Civil Relief Act," a copy of which is hereto affixed as Exhibit 2 hereof.

4. That on September 29, 1918, the respondent, Dr. Harry P. Poston, began service in the army of the United States and remained there until May 14, 1919, when he was honorably discharged (Record, 121; Exhibit 3 of record).

5. That on February 5, 1919, the period of time during which, under Michigan law, the lots might be redeemed from the sale of February 5, 1918, expired (Record, 112).

6. That the respondent, on his return to Detroit in July, 1919, after his discharge from the army, carried on some negotiations with the petitioner Ebert, looking to a settlement, but no agreement was reached, and on November 19,

1919, two attorneys representing him went to Ebert's office and tendered him a certified check in the sum of \$1,735.93 and made a demand "for the contract on the property" (Record, 68, 123; Exhibit 5).

7. That on December 18, 1919, the petitioners Andrew J. Keary and Ella R. Keary, the purchasers at the sheriff's sale, deeded the lots to the petitioner, Edmund L. Ebert (Record, 146; Exhibit G).

8. That on January 13, 1920, the respondent took a certified check in the sum of \$1,850.00 and \$200.00 in cash and tendered these to the Register of Deeds for the purpose of redeeming the lots from the mortgage sale. The Register of Deeds declined to accept the tender (Record, 60).

9. That on August 19, 1920, the bill of complaint in this cause was filed in the Circuit Court for the County of Wayne, State of Michigan, and on October 23, 1920, the defendants therein, petitioners here, answered said bill of complaint, and in due time said cause came on to be heard in said court (Record, V).

10. That in said bill of complaint, in the seventh paragraph thereof, the respondent herein alleged as follows:

"Your orator further shows unto this honorable court that said sheriff's deed aforesaid constitutes a cloud upon the title of your orator in and to said premises and should be removed therefrom by this honorable court upon such terms as this court shall deem equitable; and further that your orator should have a right to redeem said premises from the mortgage upon it because said mortgage sale was defective; because * * * and because of your orator's hav-

ing been in the military service of the United States and being therefore entitled to the benefit of the provisions of the Soldiers' and Sailors' Civil Relief Act, so called, as hereinafter set forth."

That in the prayer for relief of said bill of complaint paragraph (d) was as follows:

"That by the decree of this court under the facts and circumstances as hereinbefore set forth and under the provisions of the Soldiers' and Sailors' Civil Relief Act, so called, and under the equitable jurisdiction of this court it may be found that your orator's time for redemption had not expired when tender was made and that your orator in justice and equity is entitled to redeem from said mortgage foreclosure sale."

11. That the petitioners herein in their answer as defendants to said seventh paragraph of said bill of complaint replied as follows:

"Defendants deny that said sheriff's deed, Exhibit B, constitutes only a cloud upon the title of the plaintiff in and to said premises, and jointly and severally deny * * * jointly and severally deny that plaintiff is or at any time was entitled to the benefit of the provisions of the so-called Soldiers' and Sailors' Civil Relief Act."

12. That the Circuit Court for the County of Wayne, after hearing said cause on proofs taken in open court, filed an opinion therein (Record, 112) and held that the tender would have been legal because of the estoppel raised by the negotiations if they had been commenced within the period of redemption, as fixed by the laws of the State of Michigan.

That these negotiations were not commenced until after plaintiffs' right to redem had expired, and that the act of Congress did not extend the period of redemption and entered a decree dismissing respondents' (plaintiffs') bill of complaint (Record, 117).

13. That an appeal was taken from this decree to the Supreme Court of the State of Michigan, where the cause was heard *de novo* on the record. After a hearing and on due consideration, said court reversed the decree of the lower court and filed its opinion on December 29, 1922, a copy of which is added to the record. That on February 6, 1923, a motion was made for a rehearing before said court. In disposing of this, it filed its opinion on April 27, 1923, a copy of which is hereto affixed as Exhibit 3 hereof, and on June 12, 1923, a decree was entered in said court in said cause a copy of which is added to the record, and that said decree is the decree of the highest court in the State of Michigan.

14. That the respondent herein, in said bill of complaint in the State court, claimed a right, title, privilege and immunity under the statute of the United States, and the petitioners in the State court denied said claim and the decision of the Supreme Court of the State of Michigan is in favor of the title, right, privilege and immunity, under act of Congress, especially set up by the respondent in his bill of complaint and denied by the petitioners in their answer.

15. That there is error in the conclusion reached by the Michigan Supreme Court; that a meaning and intent has been given to this law which Congress never gave it or intended to give it; that a case has been brought within its purview which is not within it and was never intended to

be within it, and that this meaning and intent is prejudicial to these petitioners, has confiscated their property and destroyed property rights vested in them before the passage of the act. That the erroneous conclusion reached by the Supreme Court of Michigan and the relief granted are based alone on the construction given to the act of Congress.

16. That the conclusion reached by the Supreme Court of Michigan is opposed to decisions from two other States as evidenced in *Taylor vs. McGregor State Bank*, 144 Minn., 249, and *Wood vs. Vogel*, 204 Ala., 692, and the consequent confusion arises from the interpretation and construction of the same Federal statute by these various tribunals.

17. That this is the first time the question herein involved has ever been presented to this honorable court, and that the legal and just construction, interpretation and effect of the "Soldiers' and Sailors' Civil Relief Act" involved in and presented by this case of petitioners should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said question, because this court alone can give to said law its true intent and meaning and avoid the confusion which has arisen and which will continue to arise from the different conclusions had by the highest courts of the various States.

Wherefore your petitioners, in accordance with the amendment of the Federal Judicial Code of September 6, 1916, respectfully pray that a writ of certiorari issue out of and under the seal of this court, directed to the Supreme Court of the State of Michigan, commanding said court to certify and send to this court on a day certain to be therein desig-

nated a full and complete transcript of the record and all proceedings of said court in this case, which was entitled in that court Dr. Harry P. Poston, plaintiff, *vs.* Edmund L. Ebert, Andrew J. Keary, and Ella R. Keary, defendants, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the decree of said Supreme Court of the State of Michigan in this cause may be reversed by this honorable court.

P. J. M. HALLY,

Attorney for Edmund L. Ebert, Andrew J.

Keary, and Ella R. Keary, Petitioners.

STATE OF MICHIGAN,

County of Wayne, ss:

P. J. M. HALLY, being duly sworn, deposes and says that he is one of the counsel for the petitioners, Edmund L. Ebert, Andrew J. Keary, and Ella R. Keary, in the above-entitled cause, and that as such he has read the petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

P. J. M. HALLY.

Subscribed and sworn to before me this 17th day of August, A. D. 1923.

BEATRICE TACKE,

Notary Public, Wayne County, Michigan.

My commission expires Oct. 20, 1925.

EXHIBIT 1.**Compiled Laws of Michigan, 1915.***Chapter 249.—Foreclosure of Mortgages by Advertisement.*

(14949.) SECTION 1. Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage may be foreclosed by advertisement, in the cases and in the manner hereafter specified.

(14950.) SEC. 2. To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;

2. That no suit or proceeding shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part; and

3. That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereof shall have been recorded;

4. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent install-

ments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

(14951.) SEC. 3. Notice that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto.

(14952.) SEC. 4. Every such notice shall specify:

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;
2. The date of the mortgage, and when recorded;
3. The amount claimed to be due thereon at the date of the notice and
4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

(14953.) SEC. 5. The sale shall be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or a deputy sheriff of the county, to the highest bidder.

(14954.) SEC. 6. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication

until the time to which the sale shall be postponed, at the expense of the party requesting such postponement.

(14955.) SEC. 7. If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law; but if distinct lots be occupied as one parcel, they may in such case be sold together.

(14956.) SEC. 8. The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

(14957.) SEC. 9. The officer or person making the sale shall forthwith execute, acknowledge, and deliver to each purchaser a deed of the premises bid off by him; and if the lands are situated in several counties, he shall make separate deeds of the lands in each county, and specify therein the precise amounts for which each parcel of land therein described was sold. And he shall indorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law. Such deed or deeds shall, as soon as practicable, and within twenty days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated, and the register shall indorse thereon the time the same was received, and for the better preservation thereof, shall record the same at length in a book to be provided in his office for that purpose, and shall index the same in the regular index of deeds; and the fee for recording the same shall be included among the other costs and expenses allowed by law. In case such premises shall be redeemed, the register of deeds shall, at the time of destroying such deed, as provided in section twelve of this chapter, write on

the face of such record the word "Redeemed," stating at what date such entry is made, and signing such entry with his official signature.

(14958.) SEC. 10. Unless the premises described in such deed shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and cancelled, as hereinafter provided; and the record thereof shall thereafter, for all purposes, be deemed a valid record of said deed, without being re-recorded; but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

(14959.) SEC. 11. If the mortgagor, his heirs, executors, administrators, or any person lawfully claiming from or under him or them, shall, within one year from the time of such sale, redeem the entire premises sold, by paying to the purchaser, his executors, administrators, or assigns, or to the register of deeds in whose office such deed is deposited, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale at the rate per cent borne by the mortgage, not exceeding ten per cent per annum, and in case such payment is made to the register of deeds, the sum of one dollar as a fee for the care and custody of such redemption money, then such deed shall be void and of no effect; but in case any distinct lot or parcel separately sold shall be redeemed, leaving a portion of the premises unredeemed, then such deed shall be inoperative merely to the parcel or parcels so redeemed, and to those portions not so redeemed shall remain valid and of full effect.

(14960.) SEC. 12. Upon the payment of the entire sum bid at such sale, and interest thereon, and the fee of one dollar mentioned in the preceding section, as aforesaid, to the register in whose office the deed therefor shall have been deposited, or upon delivering to such register a certificate, signed and acknowledged by the person entitled to receive the same, and certified by some officer authorized to take the acknowledgment of deeds, setting forth that such sum, with interest, has been paid to such person, and upon paying to such register a fee of twenty-five cents, such register shall thereupon destroy such deed, and shall enter in the margin of the record of such mortgage a memorandum that such mortgage is satisfied, or, in case the premises shall have been sold in parcels, and one or more of said parcels shall have been redeemed, as hereinbefore provided, it shall then be the duty of the register to enter upon the face of said sheriff's deed, and the record thereof, a memorandum that the same is inoperative as to the parcel or parcels so redeemed, and to enter in the margin of the record of such mortgage a memorandum that the same is satisfied as to the parcel or parcels so redeemed.

(14961.) SEC. 13. If any person entitled to receive such redemption moneys, shall, upon payment or tender thereof to him, refuse to make and acknowledge such certificate of payment, he shall be liable to the person aggrieved thereby, in the sum of one hundred dollars damages, over and above all the actual damages sustained, to be recovered in an action on the case.

(14962.) SEC. 14. If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which such real estate was sold, and payment of the costs and expenses of such foreclosure and sale, the surplus shall be paid over by such officer or other person on demand, to the mortgagor, his legal rep-

representatives or assigns, unless at the time of such sale, or before such surplus shall be so paid over, some claimant or claimants shall file with such person so making such sale, a claim or claims, in writing, duly verified by the oath of such claimant, his agent or attorney, that such claimant has a subsequent mortgage or lien encumbering such real estate, or some part thereof, and stating the amount thereof unpaid, setting forth the facts and nature of the same, in which case the person so making such sale, shall forthwith upon receiving such claim, pay such surplus to and file such written claim with the register of the circuit court in chancery of the county in which such sale is so made; and thereupon any person or persons interested in such surplus, may apply to said court for an order referring it to a circuit court commissioner of said county, to take proofs of the facts and circumstances contained in such claim or claims so filed, and such commissioner shall, upon receiving such order, summon such claimant or claimants, party or parties interested in such surplus, to appear before him at a time and place to be by him named, and attend the taking such proof, and such claimant or claimants or party interested who shall appear as aforesaid, may examine witnesses and produce such proof as they or either of them may see fit, and the said commissioner shall, after such proofs are closed, at his earliest convenience, report the same to said court with his opinion thereon, and said court shall thereupon make an order in the premises directing the disposition of said surplus moneys or payment thereof in accordance with the rights of such claimant, claimants or persons interested.

(14963.) SEC. 15. Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure:

1. An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and,

2. An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser.

(14964.) SEC. 16. The affidavits specified in the last preceding section, may be taken and certified by any officer authorized by law to administer oaths.

(14965.) SEC. 17. Such affidavits shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

(14966.) SEC. 18. A note referring to the page and book where the evidence of any sale having been made under a mortgage, is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record be in his office.

(14967.) SEC. 19. Upon the payment of the entire sum bid at such sale, and the interest thereon and expenses as in section eleven of this act mentioned, to the register of deeds of the county in whose office the sheriff's deed shall have been deposited, the register of deeds shall give notice of such payment, by mail or otherwise to the purchaser, his agent or attorney.

EXHIBIT 2.**An Act to Extend Protection to the Civil Rights of Members of the Military and Naval Establishments of the United States Engaged in the Present War.**

(Act of March 8, 1918, Ch. —; — Stat. L., —.)

ARTICLE I.*General Provisions.*

SEC. 100. (Soldiers' and Sailors' Civil Relief Act—Suspension of Legal Proceedings and Transactions.)—That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war (— Stat. L., —).

SEC. 101. (Definitions.)—(1) That the term "persons in military service" as used in this Act, shall include the following persons and no others: All officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the Militia Bureau of the War Department; all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May

eighteenth, nineteen hundred and seventeen; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; and any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy Department; members of the Nurse Corps; Army field clerks; field clerks, Quartermaster Corps; civilian clerks and employees on duty with the military forces detailed for service abroad in accordance with provisions of existing law; and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States. The term "military service" as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term "persons in military service" until ordered to active service. The term "active service" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service" as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person" as used in this Act, with reference to the holder of any right alleged to exist against a person

in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court" as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

(5) The term "termination of the war" as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President (— Stat. L., —).

SEC. 102. (Territory Affected—Courts—Procedure for Enforcing Act.)—(1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court (— Stat. L., —).

SEC. 103. (Sureties, Guarantors, Indorsers, etc.)—Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, indorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

ARTICLE II.

General Relief.

SEC. 200. (1) (Default, Judgments—Conditions Precedent to Entry—Affidavit as to Military Service.)—That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss of damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion

be necessary to protect the rights of the defendant under this Act (— Stat. L., —).

(2) (Penalty for False Affidavit.)—Any person who shall make or use an affidavit required under this section knowing it to be false shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(3) (Attorneys to Represent Persons in Military Service.)—In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him, and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts (— Stat. L., —).

(4) (Opening Judgments—*Bona Fide* Purchasers.)—If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any *bona fide* purchaser for value under such judgment (— Stat. L., —).

SEC. 201. (Staying Actions or Proceedings—When Permitted.)—That at any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service (— Stat. L., —).

SEC. 202. (Staying Action on Contract—Effect.)—That when an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such non-performance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired (— Stat. L., —).

SEC. 203. (Staying Execution of Judgments, etc.—Attachments and Garnishments.)—That in any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

(1) Stay the execution of any judgment or order entered against such person, as provided in this Act, and

(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this act (— Stat. L., —).

SEC. 204. (Period of Stay of Actions, etc.—Codefendants.)—That any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others (— Stat. L., —).

SEC. 205. (Computing Period for Bringing Actions—Inclusive of Period of Military Service.)—That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service. (— Stat. L., —).

ARTICLE III.

Rent, Installment, Contracts, Mortgages.

SEC. 300. (1) (Eviction or Distress—Leave of Court.)—That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly

for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession (— Stat. L., —).

(2) (Stay of Proceedings.)—On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just (— Stat. L., —).

(3) (Violation of Provisions of Section—Penalty.)—Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(4) (Rent—Satisfaction—Allotment of Pay.)—The Secretary of War or the Secretary of the Navy, as the case may be, is hereby empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person (— Stat. L., —).

SEC. 301. (1) (Installments or Deposits for Property Sold or Leased—Nonpayment and Forfeitures—Rescission of Contracts.)—That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a

person, who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for non-payment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction (— Stat. L., —).

(1a) (Violation of Provisions of Section—Penalty.)—Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(2) (Repayment of Prior Installments or Deposits.)—Upon the hearing of such action the court may order the repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interest of all parties (— Stat. L., —).

SEC. 302. (1) (Secured Obligations.)—That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him (— Stat. L., —).

(2) (Proceedings to Enforce—Stay, etc.)—In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties (— Stat. L., —).

(3) (Sales under Judgments.)—No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereof made and approved by the court (— Stat. L. —).

ARTICLE IV.

Insurance.

SEC. 400. (Insurance — Definitions — “Policy” — “Premiums” — “Insured” — “Insurer.”)—That in this Article the term “policy” shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term “premium” shall include membership dues or assessments in such association, and the date of issuance of

policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article (— Stat. L., —).

SEC. 401. (Persons Entitled to Benefits of Article—Forms—Contents—Disposition—Duties of Bureau of War Risk Insurance.)—That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits (— Stat. L., —).

SEC. 402. (Policies to Which Act Applies.)—That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such con-

tracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy (— Stat. L., —).

SEC. 403. (List of Applicants—Bureau of War Risk Insurance—Rejection of Applications.)—That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two, and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval (— Stat. L., —).

SEC. 404. (Rejection of Applications in Excess of Amount Allowed—Preferences.)—That when one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately

notify the insurer and the insured in writing of such selection (— Stat. L., —).

SEC. 405. (Forfeiture of Policy for Nonpayment of Premium.)—That no policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: Provided, That in no case shall this prohibition extend for more than one year after the termination of the war (— Stat. L., —).

SEC. 406. (Reports by Insurers—Contents.)—That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, or the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference (— Stat. L., —).

SEC. 407. (Verification and Certification of Reports.)—That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer (— Stat. L., —).

SEC. 408. (Delivery of Bonds to Insurers—Insolvency of Insurers—Semiannual Statements by Insurers.)—That the Secretary of the Treasury shall, within ten days thereafter, deliver each month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided*, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligations on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance (— Stat. L., —).

SEC. 409. (Bonds as Security for Unpaid Interest—Lien of United States on Policy—Loans and Dividends.)—That

the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained (— Stat. L., —).

SEC. 410. (Death of Insured—Unpaid Premiums.)—That in the event that the military service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid (— Stat. L., —).

SEC. 411. (Failure to Pay Past Due Premiums—Effect on Policy.)—That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war (— Stat. L., —).

SEC. 412. (Account Stated Between United States and Insurer—Items Credited to Insurer.)—That at the expiration of one year after the termination of the war there shall be

an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans (— Stat. L., —).

SEC. 413. (Payment of Balance in Favor of Insurer.)—That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article (— Stat. L., —).

SEC. 414. (Policies to which Act Does Not Apply.)—That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium (— Stat. L., —).

SEC. 415. (Insurers to which Act Applies.)—That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the

collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service (— Stat. L., —).

ARTICLE V.

Taxes and Public Lands.

SEC. 500. (1) (Taxes and Assessments.)—That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid (— Stat. L., —).

(2) (Enforcement of Collection—Stay.)—When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war (— Stat. L., —).

(3) (Redemption of Property Sold or Forfeited.)—When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in mili-

tary service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption (— Stat. L., —).

(4) (Unpaid Taxes or Assessments—Interest—Penalties.)—Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon (— Stat. L., —).

SEC. 501. (Public Lands—Entrymen and Settlers in Military Service—Protection of Rights.)—That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war" approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war" approved August seventh, nineteen hundred seventeen; the Act entitled "An Act to provide further for

the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products" approved August tenth nineteen hundred seventeen; the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men, from performing assessment work during the term of such service" approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress: *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense or further assertion of any rights initiated prior to entering military service before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office (— Stat. L., —).

* * * * *

ARTICLE VI.

Administrative Remedies.

SEC. 600. (Transfers of Property, etc., with Intent to Delay—Effect on Power of Court to Ignore Provisions of Act.)—That where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since

the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made the provisions of this Act to the contrary notwithstanding (— Stat L., —).

SEC. 601. (1) (Evidence of Military Service.)—That in any proceeding under this Act a certificate signed by the Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States Service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them respectively, for the purpose shall when produced be *prima facie* evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be *prima facie* evidence of its contents and of the authority of the signer to issue the same (— Stat. L., —).

(2) (Continuance in Service—Missing or Dead Persons.)—Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction: *Provided*, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war (— Stat. L., —).

SEC. 602. (Interlocutory Orders.)—That any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require (— Stat. L., —).

SEC. 603. (Termination of Act.)—That this Act shall remain in force until the termination of the war, and for six months thereafter: *Provided*, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting or transaction aforesaid (— Stat. L., —).

SEC. 604. (Name of Act.)—That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act (— Stat. L., —).

EXHIBIT 3.

Filed April 27, 1923.

STATE OF MICHIGAN SUPREME COURT.

Dr. HARRY P. POSTON, *Plaintiff,*

vs.

EDMUND L. EBERT, ANDREW J. KEARY, and ELLA R. KEARY,
Defendants.

Before the Entire Bench.

Per Curiam:

A motion for rehearing has been filed. In it constitutional questions are discussed which were not urged in the original brief. Under numerous decisions of this court, constitutional questions may not be raised for the first time on motion for rehearing. It is also made to appear that the lots involved have been sold and substantial houses erected on them. The purchasers, however, are not before us. They are in possession. Unless the parties come to an adjustment, we may assume plaintiff will bring ejectment to recover possession. In such action the question of whether such purchasers are entitled to the benefits of sections 13211 *et seq.*, C. L., 1915, and if so to what extent, will be before the court. Such purchasers not being parties to this proceeding their rights can not be here adjudicated. The motion for rehearing will be denied.

**IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1923.**

No.

EDMUND L. EBERT, ANDREW J. KEARY, AND ELLA
B. KEARY, PETITIONERS,

v.s.

DR. HARRY P. POSTON, RESPONDENT.

BRIEF ON PETITION FOR CERTIORARI.

The Facts.

As outlined in the petition, Dr. Harry P. Poston, in May, 1917, purchased some building lots located in Hamtramck, Michigan. At the time these were subject to a mortgage which he assumed and agreed to pay. He defaulted in his payments and on February 5, 1918, under a power of sale contained in the mortgage, the lots were sold and purchased by the petitioners, Mr. and Mrs. Keary. On the same day a deed was given them by the Sheriff, recorded and placed in the custody of the Register of Deeds of the county. On

March 8, 1918, one month and three days after this sale the Congress of the United States passed the "Soldiers' and Sailors' Civil Relief Act." On September 29, 1918, the respondent entered service in the army of the United States. On February 5, 1919, the period of redemption under Michigan law expired. On May 14, 1919, the respondent received his honorable discharge from the service. On his return to Detroit, after this and in July, 1919, he began and carried on some negotiations with the petitioner Ebert, looking to a settlement. Nothing came of these and on November 19, 1919, he made a tender of a sufficient amount of money and asked for the return to him of the lots. This tender was refused and subsequently this suit was instituted.

The bill of complaint claimed Dr. Harry Poston was protected by the provisions of the "Soldiers' and Sailors' Civil Relief Act" which had prevented the period of redemption from expiring, and had extended this period for the full time he had spent in the service. The Circuit Court for the County of Wayne held against the respondent's contention and the matter was appealed to the Supreme Court of Michigan. This court reversed the decree of the lower court and entered a decree in favor of the respondent, in accordance with the prayer of his original bill.

The facts present two questions:

(1) The law being a Federal enactment, a certain scope and meaning is given to it by the Supreme Court of Michigan. Is this correct?

(2) Is a petition for a writ of certiorari the proper procedure under section 237 of the Judicial Code, as amended in 1916, by 39 Statute at Large, 726?

For convenience the second question will be first treated:

Is a petition for a writ of certiorari the proper procedure under section 237 of the Judicial Code, as amended in 1916 by 39 Statute at Large, 726?

As shown by the petition the allegations of the seventh paragraph of the original bill, its prayer for relief and the answer to these, contain statements and allegations which, when coupled with the decree of the Michigan Supreme Court, show that from the very beginning the respondent "especially set up and claimed," under a statute of the United States, a certain privilege or immunity and thus the matter is and was brought within that part of the Judicial Code, section 237 as amended by the Act of September 6, 1916, which reads as follows:

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there shall be certified to it for review and determination any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question * * *; or where any title, right, privilege or immunity is claimed under * * * statute of * * * the United States and the decision is either in favor of or against the title, right, privilege or immunity, especially set up or claimed by either party under such * * * statute * * *."

As to what is a privilege or immunity under this statute see:

Nutt vs. Knut, 200 U. S., 12.

As to procedure:

Erie R. R. Co. vs. Hamilton, 248 U. S., 369.

The Law Being a Federal Enactment, a Certain Scope and Meaning is Given to it by the Supreme Court of Michigan. Is This Correct?

The opinion of the Michigan Supreme Court rests upon the theory (1) that the right or privilege given by the Michigan statute to redeem from a mortgage foreclosure sale by advertisement, within one year of the sale, is a civil right or limitation, and (2) while not expressly referred to in the "Soldiers' and Sailors' Civil Relief Act," this right or privilege is within the "spirit" if not within the "letter" of that statute, and (3) that the period of military service, under section 205 of the Federal act must be added to the period of redemption fixed by Michigan law.

It will be almost universally admitted that in fixing the meaning of a statute its "spirit" is not to be invoked if the "letter" is clear and unambiguous. We submit that the letter of this statute is without ambiguity and that there is no occasion to invoke its spirit.

Section 302 of this act concerns itself with "secured obligations." It has three paragraphs:

Paragraph 1 outlines and defines the obligations to which it shall apply.

Paragraph 2 confers jurisdiction on courts and authorizes a "stay."

Paragraph 3 makes a sale "under a power of sale * * * contained in any such obligation, 'invalid,' if made during the period of military service." The words of this statute "secured obligations," "power of sale * * * contained in any such obligation," taken with the rest of the context, indicate very clearly that the act is here dealing with mort-

gages on real estate. Nothing could be plainer, and under these circumstances the words of the law ought to be sufficient to determine the rights given or withheld respecting these obligations.

U. S. *vs.* Goldenberg, 168 U. S., 102.

Louisville & Nashville Railway Co. *vs.* Mottley, 219 U. S., 467.

United States *vs.* Ewing, 237 U. S., 197.

The obligations mentioned in the third paragraph are the same as those named in the first and the law applies in its own words "only to obligations originating prior to the date of the approval of this act." This mortgage is dated September 25, 1916 and is consequently within this language. The paragraph continues "and secured by mortgage * * * on real property owned by a person in military service and still so owned by him." (Presumably, "still so owned by him" means, not March 8, 1918, the date of the act, but owned by him while in the service and when action is taken respecting it.)

The facts in the case here presented are *not* within this language.

Dr. Poston did not own the real estate pledged in this mortgage on March 8, 1918, and he did not own it at any time during his military service. The real estate had been sold by the sheriff of Wayne County on February 5, 1918. The doctor's personal debt, his personal liability and the mortgage which covered these had been extinguished by this sale.

Wood *vs.* Button, 205 Mich., 692, 701, 706.

Power *vs.* Golden Lumber Co., 43 Mich., 468.

The purchaser at this sale acquired an inchoate title, subject to be defeated by redemption. If not defeated his title would relate back to the time of the purchase.

Stout vs. Keys (Mich.), 2 Douglas, 184.

The mortgagor's status, as noted, was also changed. He acquired what "has always, under our law been regarded as practically a legal estate."

Hoffman vs. Harrington, 33 Mich., 392, 394.

He acquired a right which he was free to exercise or not, just as he pleased. There was no obligation on him to act under this right. He could not be forced to act under it. He had one year in which to make up his mind. On the sale of the property the offer to him came into existence, and with it certain property rights which ordinarily his mortgage contract would not give him. He was in possession, without obligation to account for rents, pay taxes or keep up insurance. This estate given him by law is an interest in land and can pass from him only by a written document.

Haak Lumber Co. vs. Crothers, 146 Mich., 575, 578.

In consequence before this law was placed upon the statute books both parties had a fixed estate and this was not a "remedy;" it was not a "limitation." It had to do with property rights as distinguished from civil rights and the question arises could the public (Congress) change or alter either of these estates without the consent of the parties, and injure one or lessen the estate of one without providing for compensation for the injured or the lessened estate?

The doubt which must necessarily arise in answering this

question brings us back forcibly to this inquiry. Is this situation in any wise covered by the Act of Congress?

When Congress acted this transaction was in the past. It had transpired. Ordinarily the law would not be held to reach it, unless the words of the statute made this intent very clear.

Schwab vs. Doyle, 258 U. S., 529, 534.

Not only is the situation here presented not covered by the law, but its absence from it is so conspicuous that this fact should invoke commanding attention in attempting to discover the meaning of the statute. Let us proceed on this point.

An equity of redemption exists in connection with every mortgage.

Parker vs. Dacres, 130 U. S., 43, 47.

In addition to this many States have provided by statute for a period of redemption after sale. The language of paragraph 3, section 302 leaves no doubt that it was not forgetfulness or ignorance or inadvertence, which caused no mention in express terms of "equity of redemption" or "period of redemption." Neither, as far as it was desired to cover them, are forgotten or ignored.

Very little is missing from this statute; almost every conceivable relation is covered by it—this is done systematically and with thoroughness. Let us illustrate:

After article 1, which contains the preamble and general purposes of the legislation:

Section 200 deals with default judgment from entry, the affidavits necessary and the setting aside or opening of all judgments.

Section 201, a general staying of proceedings in court.

Section 202, staying of a fine or penalty on account of contract stayed by this Act.

Section 203 stays execution of judgments, attachments and garnishments.

Section 204 permits actions to proceed as to codefendants.

Section 205 adds the period of military service to any statute of limitations.

Section 300 stays eviction, payment of rent and provides for an allotment of pay for rent.

Section 301 covers installments on property sold or leased and stays the rescission of contracts and the penalty for violation of contracts and confers jurisdiction on courts respecting these contracts.

Section 302 has already been referred to.

Section 400 covers insurance policies and premiums.

Section 401, the duties of the War Risk Insurance Bureau.

Section 402 defines the policies protected.

Section 403 requires a listing of applicants.

Section 404, for the rejection of applicants who apply for policies in excess of \$5,000.00.

Section 405 stays forfeiture of policies for nonpayment of premiums.

Section 406 requires reports by insurance companies and insurance associations.

Section 407, for a verification by bureaus of War Risk Insurance.

Section 408 requires United States bonds to be delivered to the insurer to make up the losses of the insurance.

Section 409 provides that these bonds are to be held as security for defaulted premiums.

Section 410 specifies deductions in the event of death of insured.

Section 411 fixes time for action after period of service.

Section 412 provides for an account between the United States and the insurer and for items of credit.

Section 413 provides for the surrender of the bonds on payment to the insurer by the United States.

Section 414 covers the policies to which the Act does not apply.

Section 415, the insurers to which the Act shall apply.

Section 500 covers taxes and assessments falling due during the period of service; stays the enforcement of collection and provides for the redemption of property sold or forfeited for the nonpayment of taxes, and fixes the maximum penalty.

Section 501 prevents loss or prejudice because of the absence from public lands from those who entered thereon.

Section 600 provides for proceedings to prevent fraudulent use of the act.

Section 601, for the evidence of military service, rights of missing or dead persons.

Section 602, jurisdiction in a court to revoke any interlocutory order.

Section 603, defining the time of termination or the period of continuance of the Act.

Surely the conclusion is natural that it was not the intention of Congress to include something which was not within this mass of detail. When the expression is used that "the equity of redemption" or the "period of redemption" is not in express terms covered by this Act, a literal truth is spoken, but if no effort is made to go beyond this the whole truth is not presented.

Turn back to Section 302 and consider the third paragraph. It absolutely "stays" the operation of any power of sale, except upon order of court. This absolute "stay" of the power of sale disposes of both "equity of redemption" and "period of redemption." This is so because:

In all of those states which have not provided for a period of redemption after sale, the equity of redemption lasts until the sale; hence if you may not operate under a power of sale in those states during the period of military service, the equity of redemption period cannot begin and of course cannot terminate. On the other hand in those states where the period of redemption comes after the date of sale if you cannot operate at all under that power of sale, the period of redemption will never start.

It was the purpose and intention of the draftsman of this act to cover the subject of "redemption" by the provision of paragraph 3 of Section 302. It is covered by it and thoroughly covered by it. It was probably, in his judgment, not possible legally to cover a situation where the rights of the parties under the exercise of a power of sale had become fixed, before the law had an existence. Hence the appropriateness here of the legal maxim: "The expression of one thing is the exclusion of all others." *Johnson vs. Southern Railway*, 17 Fed., 462, 466.

This mortgage, having passed out of existence before the act came into effect, is not covered by Section 302. This period of redemption, having started before the act was passed, is not covered by paragraph 3 of Section 302. The act having designedly, by staying the power of sale, covered this question of "redemption," a right or privilege beyond this should not be forced into the act by another Section which makes it and this section incongruous.

The Michigan court, to use the words of the opinion, said, "The act does not in precise terms refer to a limitation or foreclosure such as this" but because of what the court concluded was the intent of the lawmakers, it held the act to apply.

When you attempt to fit the facts of this case to this view of this law you are met with very serious problems, and these only emphasize the position already herein taken. The right to redeem expired February 5, 1919. Michigan's conclusion is that this right was extended for the period of military service by Section 205. Why not by 204, or 302 or 301 or 500? Any of these will fit the facts as well as 205, because 205 says "that the period of military service shall not be included in computing any period * * * limited by any law for the bringing of any action by or against any person in military service." No action was brought. The sale happened 33 days before the Act was passed and 7 months and 22 days before the Doctor entered the service. This language of Section 205 and these facts obviously have no relation to one another. Here was a right or privilege, an estate in land, in existence at the time of the passage of this act. It was not a limitation, nor was it a remedy as we understand these words. It was a fixed estate, an interest in real property and the very fact that such a section as 205 is selected to grant the relief leads very effectively to the conclusion that this law was never intended to apply to such a situation as these facts present.

We submit there should be a reversal of the conclusion reached by the Michigan Supreme Court.

P. J. M. HALLY,
Counsel for Petitioners.